

Catching Justice through Vibrant Judicial Activism: Microscopic Appraisal of Established Judiciary in the Erstwhile FATA [Pakistan]

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Abstract

The Judicial system in the erstwhile FATA was restored after the twenty-fifth amendment to the constitution of Pakistan. Though it includes Khyber Pakhtunkhwa, however facing various problems in different fields. The merger of erstwhile FATA into settled areas is, undoubtedly, a good omen for the future of merged areas. In this context, the microscopic study of the newly established judicial system is the need of the hour. The Judicial system is prematurely started there but it has fruitful implications for the people of merged areas. In the beginning, the tribal folk was not used to this system but gradually they are being adapted to it. The judicial hierarchy in the merged areas is fully functional and provides justice to the citizen of these areas. Arguably, the judicial system of erstwhile FATA is providing legal aid to its neglected citizenry which leads to positive and constructive hope of justice for them. Furthermore, the rooted fact cannot be overlooked that the people of these areas were ignored from their fundamental rights for several decades, and 'Merger' by incorporating the twenty-fifth amendment in the constitution has brought a silver lining for them in terms of safeguarding their basic human and fundamental rights under the vibrant judicial activism process. Thus, this paper is an attempt to examine the post-FCR scenario after the twenty-fifth amendment and its multi-dimensional implications on the society of erstwhile FATA. Despite this, it also highlights the role of the judiciary in the dispensation of justice in newly merged areas of Khyber Pakhtunkhwa. The methodology is qualitative in which various themes have been generated in the case study of erstwhile FATA with reference to judicial activism.

Key Words; Erstwhile FATA, FCR, Judicial Activism, Merger, Fundamental Rights

Introduction

Nation-building is an organic socio-political cycle. It not only offers security, pride and ownership to society but also guarantees the democratic involvement of individuals inside the state to claim rights and execute tasks. It helps a state to maintain its sovereignty, accomplish economic objectives, and safeguard national interests at regional and international levels. Since the 9/11 incident, terrorism has become a worldwide issue. To counter this danger Pakistan also aligned and allowed land corridors for foreign armies to have access to a landlocked Afghanistan. Across the Pak-Afghan border, in the tribal zone known as FATA, terrorism has spilled across Pakistan. The unique position of the Federally Administered Tribal Areas (FATA), throughout the last seventy years of Pakistan's history, has deprived basic rights to the people of FATA. These tribal territories were controlled by a distinct legislation known as Frontier Crimes Regulations (FCR) enacted by the British in 1901. This legislation has emerged as the biggest hurdle in bringing FATA to mainland of Pakistanⁱ.

Tribal Structure and Geo-politics of FATA

Before it was amalgamated with Khyber Pakhtunkhwa Province, Pakistan's Federally Administered Tribal Areas (FATA) in the northwest was a semi-autonomous tribal area. A separate set of rules known as the Frontier Crimes Regulations was used to manage the seven tribal districts and six frontier areas, which were directly administered by Pakistan's federal government. On the east, south, and southeast, it was bordered by Pakistan's Khyber Pakhtunkhwa and Balochistan provinces, on the south, by Punjab, and on the north, by the Afghan provinces of Kunar, Nangarhar, Khost, and Paktika. The Pashtun, who also inhabit neighboring Khyber Pakhtunkhwa and Northern Balochistan provinces and cross the border into Afghanistan, occupy the vast majority of the land. Most of them are followers of Islam.

While Mirzali Khan and his supporters did not accept Pakistan's formation in 1947 and waged a campaign against Pakistan. It was a step to fight against the new country's governing body. Even in 1950, they declared Pashtunistan an independent state. Over time, he became less popular among the residents of Waziristan as a result of jirgas in the region opting to join Pakistan.ⁱⁱ When FATA became part of the Islamic Republic of Pakistan, the authorities had little jurisdiction over surrounding territory when the Hippie Trail was being traveled via the Khyber Pass in the 1970s, travelers were advised to keep close to the road.ⁱⁱⁱ

It is argued by the US Institute of Peace that in 1980 rapid transformation took place in FATA. The CIA's Operation Cyclone and the Mujahideen fought against the jirgas as partners before the fall of the Berlin Wall and the downfall of the Soviet Union.^{iv}

As a result of this, in 2001, the Tehrik-e-Taliban terrorists started militant activities in the area.^v After the US invasion of Afghanistan, Taliban fighters migrated to get shelter in the Federally Administered Tribal Areas and started targeting troops and police in Pakistan as well as in Afghanistan.^{vi} The Afghan town of Shkin was a regular site of conflict. Located only six kilometers from the Pakistani border, this strongly guarded military station was home to the US special operations forces since 2002. It was regarded as one of the most hazardous places in the whole country.^{vii}

To encircle Al-Qaida and affiliated conglomerates almost 80,000 Pakistani soldiers entered the ex-FATA in March 2004. This operation was also backed by the US. Taliban resisted the military operation in the FATA with all its might. Later on, when the Taliban agreed to a ceasefire with the army, there was no elder in the area to work as a guarantor and conclude a treaty between the State and TTP. Non-availability of elders provided space for the Taliban to grow and make their stronghold over there.^{viii} Between 2004 and 2006, the Taliban fiercely resisted eight additional military operations in South Waziristan and North Waziristan. For their part, Pakistan agreed to discontinue significant military operations, free all detainees and allowed tribesmen to carry small firearms under provisions of peace agreements signed during the years.^{ix} On June 4, 2007, Pakistan's National Security Council convened to discuss the future of Waziristan and consider a range of political and administrative measures to prevent the "Talibanization" in the region. President Pervez Musharraf presided over the high-level meeting, in which chief ministers and governors of Pakistan's four provinces participated. Since the law and order situation has deteriorated, and the writ of the state was being violated with each passing day, the government resolved to initiate full-fledged military operations against the militants. In this operation, certain madrasas were also targeted that were involved in indoctrination and training. During the operation, unlawful FM radio stations were also banned in the Tribal areas and other parts of Khyber-Pakhtunkhwa so that armed militancy could be fixed firmly.^x

25th Amendment and Status of FATA

On May 28, President Mamnoon Hussain of Pakistan officially approved the merger of FATA with Khyber-Pakhtunkhwa Province by signing the 25th constitutional amendment. Having completed this last official stage, the formal process of transforming the whole legal character of a territory famed in history and traditions as the home of a strong, fiercely independent individuals who adhered to Pashtunwali will now begin. However, it is doubtful that the transition would be as seamless as expected or planned by the Pakistani government.

To put it another way: In November 2015, Prime Minister Nawaz Sharif appointed Sartaj Aziz, a former foreign policy adviser to Sharif, to head the FATA reforms committee. Appointing the committee occurred as a result of Pakistani forces' June 2014 operation against Taliban terrorists in North Waziristan, known as Zarb-e-Azb. As a result of the army's military campaign against the Taliban, many people were forced to flee their homes and infrastructure was destroyed. The plight of the indigenous peoples continues.

Track II discussions with Pakistani politicians and establishment a few years ago indicated the belief that a new and more mainstream civilian set-up and speedy development activity in FATA as a whole would be essential to avoid North and South Waziristan's return to the old status quo. Evidently, the army came to the same conclusion that it would be necessary for it to maintain a permanent presence in the FATA. As long as its constitutional standing remains unchanged, this cannot happen.

The political leadership and establishments shared this point of view. Therefore, in order to enforce the Frontier Crimes Regulation, which is the fundamental legislation of FATA, the court and public administration systems used a model that was regarded outdated for many years by Pakistanis. There were and still are many in FATA and KPK who were and are opposed to the adoption of the new administrative and judicial systems that are foreign to the traditional methods.^{xi}

The Judicial System of Erstwhile FATA

FATA is included in the 1973 constitution of Pakistan under Article -1(c). The tribal territories are outlined under Articles 51, 145, 246, and 247 of the 1973 constitution. As stated in Article 51 (6): The president of Pakistan may expand the election method to the tribal vicinities. Similarly, the

Khyber Pakhtunkhwa governor is authorized to represent FATA people before the president. Pakistan's president serves as both the constitutional leader of the country and the top executive of the country's tribal territories, as stated in Article 246. '*No constitutional revisions are required to dissolve tribal regions under Article 247, which explicitly sets forth presidential authority to do so*'. In addition, the president has the power to choose the legislation that required the implementation herein FATA.^{xii}

However, nationals of FATA were not granted citizenship rights under Pakistan's 1973 constitution since they were given a unique status in the province. People of FATA have been denied all of their basic rights under Article 8-28 of the Pakistani Constitution of 1973, and the judiciary will protect them if any of these basic rights are violated. Basically, since its demarcation, FATA has been ruled under the British-made draconian' law Frontier Crime Regulation-1901, which violates the basic rights of the people of FATA.^{xiii}

On June 27th, 1950, the tribal territories became self-governing area and were entrusted to the tribesmen. Initially, the Government of India Act of 1935 was amended in Pakistan by the Constitutional Order of 1947, and the tribal regions were designated as excluded territories and subject to the Frontier Crime Regulation (FCR) system.

As a result of Pakistan's 1956 constitution, which established a structure of one unit, the tribal regions were given the names as Federally Administered Tribal Areas (FATA) and Provincially Administered Tribal Area (PATA). Because of Pakistan's security concerns, the federal government took authority over FATA. Furthermore, the Durand line connects Afghanistan to these regions. As a result, the Durand Line came within the purview of the federal government's administration. PATA was managed by both Baluchistan and Khyber Pakhtunkhwa at the same time as these regions were considered unable to manage their own affairs.

As far as FATA administration is concerned, since August 14, 1947, when Pakistan gained independence from Britain, the governmental structure of tribal regions has undergone several changes. Khyber Pakhtunkhwa Governor was an Agent of Pakistan's Governor-General over tribal territories at that time. The chief secretary of the Khyber Pakhtunkhwa government was in charge of his secretariat, which handled all affairs pertaining to the administration of FATA. As a result of Pakistan's establishment, the federal government now has control over FATA's governance and policy-making processes. After 1958, these arrangements remain intact. FATA's administrative

structure was evaluated in 1958 and deemed an urgent method of administration; tribal regions were handled by the resident commissioner from November 1959 to August 1960, because the region was governed by both the national and provincial governments, the system was abolished in 1960 as an economic measure.^{xiv}

Furthermore, the political agent serves as a supervisory body made up of various government officials. The political agent is also in charge of the executive, judicial, and tax branches of government. Under the supervision of political Agents, the tribe Levies were responsible for preserving law and order. Tehsildars, Naib Tehsildars, and Khassadars were political agents, assistant political agents, and Tehsildars, Naib Tehsildars, and Khassadars (local police) Maliks' were also the part of the office of political agent. Pakhtun society is traditionally been formed by hereditary tribal chiefs and the customary code of honour (Pashtunwali). The British colonial authorities attempted, but failed, to control the Pashtun through numerous tactics. With the aid of local Maliks, the British built roads and infrastructure. Pakistan has kept the Malik system, which was instituted by the British to manage the tribal areas. In the Jirga system of tribal council, Maliks play a key role in settling conflicts among tribal people according to their customs and traditions. It is the method for resolving conflicts in tribal areas, keeping peace, and generally assisting the government. With the support of Maliks, the political agent was often used to exploit his power.^{xv}

Moreover, the tribal vicinities were utilised as a buffer zone against Russian expansionism. In 1901, the British implemented the Frontier Crime Regulation (FCR) judicial system. A political agent was chosen, who worked closely with tribal leaders in the area. There was no oversight of political agents and tribal elders' choices. After the establishment of Pakistan, this structure was kept. The rule of law, as stated in Pakistan's constitution, was denied to the people of FATA. There has never been a governing organisation in the region that could enact laws for the Tribal people. In the indigenous communities, this scenario created a legal vacuum. The president of Pakistan was constitutionally entitled to pass legislation for FATA, and the office was also indirectly empowered to oversee the region's affairs through the Governor of Khyber Pakhtunkhwa. Fundamental rights were not granted to the FATA under the Pakistani constitution. Twelve members of the national assembly represent tribal vicinities, while eight members of the senate are indirectly elected; these members have the right to resist or oppose any issue or demand in other

parts of Pakistan, but not in their own, where their opinion will only be considered if the head of state specifically requests it.^{xvi}

Comparative Study of DRC and Old Jirga System in Ex-FATA

The Dispute Resolution Council (DRC) mechanism was recently extended to the newly united tribal districts by the Khyber Pakhtunkhwa government. The goal of this move was to reduce load on the fledgling normal judicial system in the former tribal regions. For some time, this alternative reconciliatory system of justice at the grassroots community level has been operating throughout Khyber Pakhtunkhwa's settled districts. The Khyber Pakhtunkhwa administration argued, since tribal districts' residents are accustomed to a legal system based on reconciliatory local Jirgas, this process would be successful in these areas. The claim that this system of justice is more efficient, less costly, and accessible to the general public.

In order to establish an Alternate Dispute Resolution (ADR) system at the tehsil level in the amalgamated districts, the government amended the Khyber Pakhtunkhwa Local Government Act 2013 in this respect. These DRCs were made up of forty neutral elders chosen from the affected district, with 10 members recommended by the District Commissioner (DC) from the civil administration. The remaining 30 are either suggested by legislators or nominated by themselves. The Assistant Commissioner (AC) will choose three to four people from the ADR membership to resolve any civil dispute.

The parties to the dispute will have no influence in how ADR will be formed for their case. The Assistant Commissioner has the authority to appoint anybody suitable for the matter at hand. These ADR members listen to the parties and then debate over the matter utilising tribal customary law to make a decision. Then they submit the file to the assistant commissioner with their findings, report, or decision. A victimised party can approach to assistant commissioner or Deputy commissioner for lodging complaint. After the evaluation of case AC or DC will pass a judgement and it will be considered final. Moreover, the decision cannot be challenged and appealed in any court of the country.

The authorities put in place this mechanism with the good goal of assisting the newly formed judicial system in the amalgamated districts. The obvious rationale for this mechanism might be

that the traditional court system lacks the necessary data, infrastructure, staff, forensics capabilities, and other resources for case investigation and legal proceedings.

Apart from that, the Jirga process should not be taken away from the people all at once because they are unfamiliar with Pakistan's legal system.^{xvii}

Conclusion

Almost everyone in Pakistan has praised the merger. It was viewed as the end of an outmoded and inequitable system that allowed criminals to hide and contraband to thrive, causing considerable economic damage. Experienced Pakistani observers, on the other hand, claim that the people of FATA did not want or require structural reforms, but rather an end to its militarization, infrastructure development to replace what had been destroyed in the previous decade and a half. They admit that certain fundamental changes are required, but the FATA population will now be subjected to an inefficient and unwieldy administrative structure. They will be reminded that in the past, crime in FATA was minimal and justice was delivered quickly, but that will no longer be the case. Finally, they have reservations that allocated financial resources would be used to create the administrative machinery rather than to meet the needs of the people.

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